Public Prosecutor v Lim Hock Boon

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–74 OF 2005(B)
ZAKI AZMI CJ, ALAUDDIN PCA, NIK HASHIM, AUGUSTINE PAUL AND ABDUL AZIZ MOHAMAD FCJJ
20 FEBRUARY 2009

Criminal Law — Dangerous drugs — Trafficking — Whether trial judge misdirected himself by relying upon inadmissible evidence — Whether trial judge erred in handling of facts relating to defence — Whether trial judge erred in making alternative finding of actual trafficking as defined in s 2 of the Dangerous Drugs Act 1952 after invoking presumption in s 37(da) of same — Dangerous Drugs Act 1952 ss 2, 37(da), 37A(1), 39B(1)(a)

Evidence — Admissions — Oral admission — Whether trial judge misdirected himself by relying upon inadmissible evidence — Dangerous Drugs Act 1952 s 37A, 37A(1)(b)

Acting on information received the Chief Inspector of the Narcotic Division in Kelang ('the Chief Inspector') together with a police party laid an ambush at a Shell petrol station. While laying in wait they noticed the respondent driving a silver Proton Saga and cruising about the petrol station, which was closed, several times in the night before stopping at the air pump. When the car came to a halt the Chief Inspector approached the respondent and identified himself as a police officer. He then switched off the car's engine which was still running and took possession of the car keys. Upon realising that he was being apprehended by the police, the respondent, whom the Chief Inspector noticed was in a state of panic and sweating, pleaded for help to be released. Thereafter the police discovered a package, which upon subsequent chemical examination was found to be 892.4g of cannabis, hidden in the car. The respondent was charged for trafficking in the drugs pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). At the close of the case for the prosecution, the trial judge found that the prosecution had made out a prima facie case of trafficking. The defence of the respondent was that the cannabis had been placed in the car by someone without the respondent's knowledge and that since he had no knowledge of the existence of the cannabis he was not guilty of trafficking. The respondent sought to persuade the court that one of three people, namely his brother, a workmate and one Ah Ba with whom he had spent the evening, had put something in

his car without his knowledge. The respondent further claimed that he had cruised about the petrol station to prevent the engine from overheating, while waiting for the said Ah Ba to return from the washroom in the petrol station, and that it was at that time that the police had confronted him. The trial judge found the story about Ah Ba to be a mere fabrication because he accepted the evidence of the police witnesses that the respondent was alone in the car when he arrived at the petrol station. He thus found that the respondent had failed to cast a reasonable doubt on the prosecution's case. The trial judge therefore went on to hold that the prosecution had proved actual possession of the cannabis by the respondent and that the presumption under s 37(da) of the Act could therefore be invoked. Alternatively the trial judge found that the prosecution had proved that the respondent was trafficking in the sense that he was 'keeping' and 'concealing' the cannabis within the meaning of s 2 of the Act. The respondent was therefore convicted and sentenced to death for trafficking in dangerous drugs. On appeal the Court of Appeal set aside the conviction, and hence this appeal.

Held, allowing the appeal and restoring the conviction and sentence of the High Court:

(1) In the present case the trial judge found that the respondent had the required knowledge and his finding of knowledge was correctly made upon a consideration of the whole of the circumstances relating to the arrest and the finding of the cannabis. This approach taken by the trial judge was in line with the established method of making a finding on 'knowledge'. Although the Court of Appeal found that the trial judge had misdirected himself by relying on incriminating statements made by the respondent after his arrest and before being cautioned, which rendered the statements inadmissible evidence under s 37A(1) of the Act, it must be noted that the trial judge qualified the impugned part with the word 'juga'. In other words the trial judge considered the incriminating statements as 'also' showing knowledge. Thus the impugned part did not form the foundation for the finding of 'knowledge'. Further, it was clear that the trial judge had addressed his mind to all that had transpired before and at the time of arrest of the respondent to justify his finding of knowledge (see paras 11–13).

(2) For the purposes of s 37A of the Act the question of when a person is under arrest is a question of fact to be decided according to the circumstances of each case. Upon considering the police report lodged by the Chief Inspector, which the Court of Appeal appeared to have not considered, the respondent was not under arrest when his car was blocked by the police or when the Chief Inspector switched off the engine and took possession of the car keys. At most the acts of blocking

the car, switching off the engine and taking possession of the keys amount to a constructive arrest and the need to administer the caution under s 37A of the Act did not arise. As such, the respondent's statement seeking the assistance of the police to be released was admissible evidence as the respondent was not yet under actual arrest at that time. In any case the respondent continued pleading for help from the police even after the administration of the caution. Thus the proviso to s 37A(1)(b) had been satisfied making the statement admissible (see paras 15–20)

(3) Upon scrutinising the entire evidence before the court the clear inference would be that that the respondent had custody or control over the cannabis and that the respondent had mens rea possession of the cannabis found in the car. Therefore the trial judge had not erred in his finding of knowledge on the part of the respondent (see para 22)

(4) The trial judge did not err in his handling of the facts because the respondent had in his defence sought to blame only Ah Ba and not his brother. Thus, the fact that the trial judge had found the respondent's brother to be a fictitious person had no relevance. Further, the trial judge's findings clearly showed that he was alive to the facts and made a finding of fact based on competing versions of events by the witnesses. Therefore there was no failure by the trial judge to judicially appreciate the evidence before him (see paras 25–27)

(5) The trial judge had misdirected himself, as the Court of Appeal found, in accepting and relying on the evidence of the respondent leading the Chief Inspector to the front passenger door and in pleading to be let off. However, despite the misdirection, the trial judge's finding of knowledge and of prima facie proof of trafficking by the presumption in s 37(da) was a safe finding because there was enough prima facie proof of knowledge in the remaining evidence that led to the irresistible inference that he knew about the cannabis in his car (see para 49)

(6) The trial judge had erred in his handling of the facts when he said that the respondent's failure to call his brother had deprived his testimony of weight because it would have been unreasonable to produce the brother as a witness when even the police had been unable to locate him. However, even if the trial judge had erred in this respect he was nevertheless right to have rejected the suggestion that it was the respondent's brother who had placed the cannabis in the car, based on the evidence of the other witnesses (see paras 78–80).

(7) The trial judge in this case found an alternative case of actual trafficking at the close of the case for the prosecution and not as the Court of Appeal said at the end of the case. The judgment in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 (*Chia Leong Foo*'s case) that was

relied upon by the Court of Appeal was no authority for rejecting the prosecution's reliance on the alternative ground, on which the trial judge in the present case found that the prosecution had made out a prima facie case of trafficking. *Chia Leong Foo*'s case does not state whether the prosecution proceeded on the basis of actual trafficking only or on the basis of trafficking by presumption only, but was a case in which the prosecution sought to rely on whichever means that was available to prove trafficking (see paras 67–68)

(8) In the instant case, the trial judge had made an express finding of actual possession and since the weight of the cannabis exceeded the trigger amount of 200g he applied the presumption of trafficking under s 37(da) of the Act against the respondent. The failure of the respondent to cast a reasonable doubt over the prosecution case meant that the respondent was rightly convicted by the High Court. Thus the conviction by the High Court was safe (see para 35).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima Cif Inspektor Bahagian Narkotik di Kelang ('Cif Inspektor') bersama sepasukan polis telah menyerang hendap stesen minyak Shell. Sementara menunggu mereka memerhati responden memandu kereta Proton Saga berwarna perak dan berulang alik di stesen minyak yang telah tutup itu, beberapa kali pada waktu malam sebelum berhenti di tempat pam angin. Apabila kereta itu berhenti Cif Inspektor mendekati responden dan memperkenalkan dirinya sebagai pegawai polis. Dia kemudian memberhentikan enjin kereta yang masih hidup dan mengambil kunci kereta. Menyedari dia ditahan oleh polis, responden, yang mana Cif Inspektor melihat berada dalam keadaan panik dan berpeluh, telah merayu meminta tolong agar dilepaskan. Seterusnya pihak polis menjumpai bungkusan, yang mana setelah menjalani pemeriksaan kimia didapati merupakan 892.4g kanabis, yang tersembunyi dalam kereta itu. Responden telah dituduh kerana mengedar dadah menurut s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pihak pendakwaan, hakim perbicaraan mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie pengedaran. Pembelaan responden adalah bahawa kanabis itu telah diletakkan dalam kereta itu oleh seseorang tanpa pengetahuan responden dan memandangkan dia tiada pengetahuan tentang kewujudan kanabis itu dia tidak bersalah kerana mengedar. Responden memohon untuk meyakinkan mahkamah bahawa salah seorang daripada tiga orang, iaitu abangnya, rakan sekerja dan Ah Ba yang bersamanya petang itu, telah meletakkan sesuatu dalam keretanya tanpa pengetahuannya. Responden selanjutnya mendakwa bahawa dia berulang alik di stesen minyak itu untuk mengelakkan enjin daripada terlampau panas, sementara menunggu Ah Ba kembali daripada bilik air di stesen minyak itu, dan bahawa pada masa itulah polis

mendatanginya. Hakim perbicaraan mendapati bahawa cerita tentang Ah Ba palsu semata-mata kerana beliau menerima keterangan saksi-saksi polis bahawa responden seorang diri dalam kereta semasa tiba di stesen minyak itu. Beliau mendapati bahawa responden telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan. Oleh itu hakim perbicaraan telah memutuskan bahawa pihak pendakwaan telah membuktikan milikan sebenar kanabis oleh responden dan bahawa anggapan di bawah s 37(da) Akta boleh digunakan. Secara alternatif hakim perbicaraan mendapati pihak pendakwaan telah membuktikan bahawa responden telah mengedar dalam erti kata bahawa dia sedang 'keeping' dan 'concealing' kanabis dalam maksud s 2 Akta. Responden oleh itu disabitkan dan dihukum mati kerana mengedar dadah berbahaya. Atas rayuan Mahkamah Rayuan telah mengetepikan sabitan, dan justeru itu rayuan ini dibuat.

Diputuskan, membenarkan rayuan dan mengembalikan sabitan dan hukuman Mahkamah Tinggi:

(1) Dalam kes ini hakim perbicaraan mendapati bahawa responden mempunyai pengetahuan dan penemuannya tentang pengetahuan dibuat dengan betul setelah mempertimbangkan keseluruhan keadaan berkaitan tangkapan dan penemuan kanabis itu. Pendekatan yang diambil oleh hakim perbicaraan ini selari dengan cara tetap membuat penemuan tentang 'knowledge'. Meskipun Mahkamah Rayuan mendapati bahawa hakim perbicaraan telah salah arah kerana bergantung kepada kenyataan yang menunjukkan suatu yang salah oleh responden selepas tangkapannya dan sebelum diberi amaran, yang menyebabkan kenyataan itu tidak boleh diterima sebagai keterangan di bawah s 37A(1) Akta, perlu ditekankan bahawa hakim perbicaraan membataskan bahagian yang dipersoalkan dengan perkataan 'juga'. Dalam erti kata lain hakim perbicaraan mempertimbangkan kenyataan yang menunjukkan sesuatu bersalah itu sebagai 'also' menunjukkan pengetahuan. Oleh itu bahagian yang dipersoalkan tidak membentuk asas penemuan tentang 'knowledge'. Selanjutnya, adalah jelas bahawa hakim perbicaraan telah mengarah mindanya kepada semua yang telah berlaku sebelum dan semasa tangkapan responden untuk menjustifikasikan penemuan beliau tentang pengetahuan (lihat perenggan 11–13).

(2) Bagi tujuan s 37A Akta persoalan tentang bila seseorang itu ditahan adalah persoalan fakta yang perlu diputuskan menurut keadaan setiap kes. Setelah mengambilkira laporan polis yang dibuat oleh Cif Inspektor, yang mana dilihat tidak diambilkira oleh Mahkamah Rayuan, responden tidak ditangkap apabila keretanya ditahan oleh polis atau apabila Cif Inspektor memadamkan enjin dan mengambil kunci

kereta. Lebih-lebihpun tindakan menghalang kereta, memadamkan enjin dan mengambil kunci itu membentuk tangkapan konstruktif dan keperluan untuk memberi amaran di bawah s 37A Akta tidak timbul. Oleh itu, kenyataan responden meminta pertolongan polis untuk dilepaskan merupakan keterangan yang boleh diterima kerana responden belum lagi di bawah tangkapan sebenar pada masa itu. Dalam apa keadaan responden terus meminta tolong daripada polis selepas pelaksanaan amaran. Oleh itu proviso kepada s 37A(1)(b) telah dipenuhi menjadikan kenyataan itu boleh diterima (lihat perenggan 15–20).

(3) Setelah meneliti keseluruhan keterangan di hadapan mahkamah inferens yang jelas adalah bahawa responden mempunyai jagaan atau kawalan ke atas kanabis dan bahawa responden mempunyai mens rea milikan kanabis yang dijumpai dalam kereta itu. Oleh itu hakim perbicaraan tidak terkhilaf dalam penemuannya tentang pengetahuan di pihak responden (lihat perenggan 22).

(4) Hakim perbicaraan tidak terkhilaf dalam mengendalikan fakta kerana responden dalam pembelaannya telah menyalahkan Ah Ba sahaja dan bukan abangnya. Oleh itu, fakta bahawa hakim perbicaraan mendapati abang responden merupakan seorang yang direka tidak relevan. Selanjutnya, penemuan hakim perbicaraan jelas menunjukkan bahawa beliau peka terhadap fakta dan membuat penemuan fakta berdasarkan versi-versi yang bertentangan tentang kejadian itu oleh saksi-saksi. Oleh demikian hakim perbicaraan tidak gagal di dalam menghalusi secara kehakiman keterangan di hadapan beliau (lihat perenggan 25–27).

(5) Hakim perbicaraan telah salah arah, seperti yang diputuskan oleh Mahkamah Rayuan, kerana menerima dan bergantung kepada keterangan responden yang membawa Cif Inspektor ke pintu penumpang hadapan dan memplid supaya dilepaskan. Walau bagaimanapun, meskipun berlaku salah arah, penemuan hakim perbicaraan tentang pengetahuan dan bukti prima facie pengedaran oleh anggapan dalam s 37(da) merupakan penemuan yang kukuh kerana terdapat bukti prima facie yang mencukupi tentang pengetahuan dalam keterangan lain yang membawa kepada inferens tidak dapat dibendung bahawa dia mengetahui tentang kanabis dalam keretanya (lihat perenggan 49).

(6) Hakim perbicaraan telah terkhilaf dalam mengendalikan fakta apabila beliau menyatakan bahawa kegagalan responden untuk memanggil abangnya telah menjejaskan testimoninya kerana tidak munasabah untuk mengemukakan abangnya sebagai saksi apabila pihak polis sendiri tidak dapat mengesannya. Walau bagaimanapun, meskipun hakim perbicaraan terkhilaf berkaitan ini beliau adalah betul untuk

menolak cadangan bahawa abang respondenlah yang meletakkan kanabis dalam kereta itu, berdasarkan keterangan saksi lain (lihat perenggan 78–80).

(7) Hakim perbicaraan dalam kes ini mendapati kes alternatif pengedaran sebenar di penutup kes pihak pendakwaan dan bukan seperti yang dinyatakan Mahkamah Rayuan di akhir kes. Penghakiman dalam kes *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 (kes *Chia Leong Foo*) yang digunakan oleh Mahkamah Rayuan bukan autoriti untuk menolak penggunaan pihak pendakwaan atas alasan alternatif, yang mana hakim perbicaraan dalam kes ini mendapati bahawa pihak pendakwaan telah menunjukkan kes prima facie tentang pengedaran. Kes *Chia Leong Foo* tidak menyatakan sama ada pihak pendakwaan memulakan kes berdasarkan pengedaran sebenar sahaja atau berdasarkan pengedaran oleh anggapan sahaja, tetapi suatu kes di mana pihak pendakwaan ingin bergantung pada apapun maksud yang ada untuk membuktikan pengedaran (lihat perenggan 67–68).

(8) Dalam kes ini, hakim perbicaraan telah membuat penemuan nyata tentang milikan sebenar dan memandangkan berat kanabis melebihi jumlah 200g beliau menggunakan anggapan pengedaran di bawah s 37(da) Akta terhadap responden. Kegagalan responden untuk menimbulkan keraguan munasabah ke atas kes pihak pendakwaan bermaksud bahawa responden telah disabitkan sewajarnya oleh Mahkamah Tinggi. Oleh itu sabitan oleh Mahkamah Tinggi adalah kukuh (lihat perenggan 35).]

Notes

For a case on oral admission, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 118.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Chow Kok Keong v PP [1998] 2 MLJ 337, FC (not folld)

Cohen Lorraine Philis & Anor v PP and another appeal [1989] 3 MLJ 289, SC (refd)

Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)

Lim Beng Soon v PP [2000] 4 SLR 589, CA (refd)

Muhammed Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (folld)

Ong Ah Chuan v PP [1981] 1 MLJ 67, PC (refd)

Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360; [1991] 3 CLJ 2914, HC (distd)

PP v Abdul Manaf Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)

PP v Badrulsham bin Baharom [1988] 2 MLJ 585, HC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Salleh bin Said [1983] 2 MLJ 164, HC (refd)
Ramis a/l Muniandy v PP [2001] 3 SLR 534, CA (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (folld)
Teh Geok Hock v PP [1989] 3 MLJ 162, SC (folld)
Teh Hock Leong v PP [2008] 4 CLJ 764, CA (refd)
Vee Ya Mang v PP [1972] 1 MLJ 120, HC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, CA (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 3, 6, 37, 37(d), (da), (da)(1), 37A(1), (1)(b), 39A(2), 39B, 39B(1)(a), (2)
Dangerous Drugs Ordinance 1952 s 37A(1)
Drugs (Prevention of Misuse) Act 1964 [Singapore] s 1
Misuse of Drugs Act 1973 [Singapore] ss 3(c), 10, 15

Appeal from: Criminal Appeal No B-05–70 of 2004 (Court of Appeal, Putrajaya)

Manoj Kurup (Deputy Public Prosecutor, Attorney Generals' Chambers) for the appellant.
Gurbachan Singh s/o Bagawan Singh (Bachan & Kartar) for the respondent.

Zaki Azmi CJ:

[1] I have the advantage of reading the two grounds of judgments of my learned brothers Abdul Aziz Mohamad FCJ and Nik Hashim FCJ. Both judgments dealt at length on the legal position of possession. And I do not need to go into them again.

[2] As regards the respondent's defence that the drug could have been put in the car by any one of the three persons named by him, I agree with the learned trial judge that for reasons given by him that the respondent has not raised any reasonable doubt in the prosecution's case.

[3] I therefore allow the appeal and set aside the orders of the Court of Appeal. The conviction and sentence of the High Court are restored.

Nik Hashim FCJ:

BACKGROUND FACTS

[4] The respondent was convicted and sentenced to death by the Kuala Lumpur High Court on 23 August 2004 for trafficking in dangerous drugs, ie 892.4g of cannabis under s 39B of the Dangerous Drugs Act 1952 ('the Act'). On appeal, the Court of Appeal allowed the appeal and set aside the conviction and sentence imposed. The prosecution now appeals to this court against the decision of the Court of Appeal.

[5] The facts are that on 28 January 2000 at about 2am Chief Inspector William Kuyal (PW8) of the Narcotic Division at the Police Headquarters in Kelang together with a police party comprising six officers proceeded to a Shell petrol station at Jalan Batu Tiga Lama, Kelang. There he and his party laid an ambush. An hour later, a silver Proton Saga No BDH 8872 came into the petrol station. It was driven three or four times through and around the forecourt of the petrol station. There was only one person in the car. It was the respondent. He was the driver. PW8 witnessed all this. When the car came to a halt, he and his party approached it. PW8 identified himself to the respondent as a police officer. The car's engine was still running. He switched it off and took possession of the ignition key. He noticed that the respondent appeared to be in a state of panic and was sweating. On realising that they were the police the respondent pleaded for help to release him. He also made certain statements to PW8. These statements were expunged by the trial court as being inadmissible for want of a caution. The car was searched. The police found a newspaper — wrapped package beneath the front passenger seat. Subsequent chemical examination revealed that the package contained 892.4g of cannabis. The respondent was later charged for trafficking in the drugs. At the end of the prosecution case, his defence was called. He gave his evidence on oath.

THE DEFENCE

[6] According to the respondent, who was the sole witness in his defence, his car BDH 8872 had been borrowed by his brother, Lim Hock Kee, the day before. He had returned the car at about 8pm on 27 January 2000. At about 9.30pm the respondent used the car to pick up a friend, one Ah Ba, and together, they went to a karaoke lounge. Whilst there Ah Ba told the respondent that he wanted to take something from the car and asked the respondent for the keys. The respondent obliged. Ah Ba returned after a

A while. At about 1.30am on 28 January 2008 the respondent and Ah Ba left the karaoke lounge. They stopped for supper. On the way home, Ah Ba complained of stomach ache and wanted to use a toilet. The respondent stopped at the said Shell petrol station and Ah Ba alighted from the car and went to the toilet. While he was waiting for Ah Ba, the police pounced on
B him. However, the respondent admitted that he did circle in the vicinity of the station a few times because he said his car could not remain stationary long with the engine running as it would overheat.

THE HIGH COURT'S DECISION

C

[7] On convicting the respondent, the learned High Court judge (Zulkefli J) (now FCJ) made the following findings:

(i) The respondent owned the car and had used it for VA years prior to the
D arrest. He was alone in the car when he was arrested. Based on these facts the respondent had actual possession of the cannabis (p 194 of the appeal record jilid 2).

(ii) With regard to the element of 'knowledge', this had been proved by
E surrounding circumstances with the respondent pleading to be released as soon as the police introduced themselves. He was also in a state of panic and was sweating.

(iii) The person named as Lim Hock Kee did not exist. His existence was created by PW7 (the respondent's wife) as an afterthought to help the
F respondent. PW7 contradicted herself by stating that this Lim Hock Kee had borrowed the car on 28 January 2000 at around 8.30am at which time the car was already in police custody.

(iv) The respondent failed to cast a reasonable doubt on the prosecution's
G case. His defence was a mere denial. The court could give little weight to the respondent's evidence that his brother Lim Hock Kee had borrowed his car earlier because he had failed to call this person as a witness (p 212 of the appeal record jilid 2).

H (v) With regard to the existence of 'Ah Ba' the learned judge said at p 213 of the appeal record jilid 2:

> Berhubung dengan isu kewujudan seorang rakan OKT bernama Ah Ba yang didakwa oleh OKT ada bersama-samanya semasa malam kejadian sebelum OKT ditahan, saya mendapati fakta ini adalah rekaan OKT semata-mata.
I Keterangan OKT atas isu ini adalah tidak konsisten dan saya menerima keterangan pihak serbuan polis yang tidak dicabar yang menyatakan mereka hanya melihat OKT seorang sahaja di tempat kejadian di stesyen minyak Shell berkenaan (Rujuk kes *PP v Mohamed AN* [1962] MLJ 257) (p 213 of the appeal record jilid 2).

(vi) The prosecution had proved actual possession of the cannabis on the part of the respondent. Thus, the presumption under s 37(da) of the Act could be invoked. Alternatively, the prosecution had proved that the respondent was trafficking in the sense that he was 'keeping' and 'concealing' the cannabis within the meaning of s 2 of the Act.

THE DECISION OF THE COURT OF APPEAL

[8] Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal reported in [2007] 1 MLJ 46; [2007] 4 CLJ 114, allowed the appeal of the respondent and quashed the conviction and sentence. Amongst the court's findings are:

(i) The High Court erred in finding mens rea possession based on statements made by the respondent before being cautioned. This is what the court said at p 51 para 9 (MLJ); p 121 para 9 (CLJ):

> So too here. It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys. That is why the learned judge held these statements to be inadmissible. Unfortunately, when he came to consider the issue of mens rea possession, he relied on these excluded statements to hold that the appellant had knowledge of the nature of the drug in question and was therefore in possession of it. This is clearly a misdirection.

(ii) The learned judge erred in his handling of the facts in that he dismissed the existence of Lim Hock Kee as a fiction when in fact the prosecution had accepted him as a real person. Further, if the police could not locate this Lim Hock Kee, it was unreasonable for the learned judge to expect the respondent to call him as a witness. Thus, there was no judicial appreciation of the evidence.

ISSUES

[9] Broadly, there are two issues to be determined by this court:

(i) Whether the learned judge used and relied upon inadmissible evidence to find 'knowledge' on the part of the respondent.

(ii) Whether the learned judge had erred in his handling of the facts.

[10] Having heard the submissions advanced and read the authorities submitted by both parties, I find merit in the appeal.

A THE FIRST ISSUE

[11] On the first issue, I agree with the appellant that the finding of knowledge on the part of the respondent was correctly made by the trial court upon a consideration of the whole of the circumstances relating to the arrest and the finding of the cannabis. The approach taken by the learned trial judge was in line with the established method of making a finding on 'knowledge'. As Lim Beng Choon J said in *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 at p 590 paras C–D left:

> ... Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question.

[12] In the present case, the learned trial judge found that the respondent had the required knowledge for the following reason as at pp 194–195 of the appeal record jilid 2:

> Pengetahuan (knowledge) pula pada pendapat saya telah dibuktikan melalui 'surrounding circumstances' di mana tindakan OKT meminta tolong untuk dilepaskan sebaik sahaja SP8 memperkenalkan diri sebagai polis jelas menunjukkan OKT mengetahui ada barang salah di dalam kereta tersebut. Jika tidak, apa perlu OKT meminta dilepaskan setelah mengetahui SP8 ialah seorang anggota polis. OKT juga kelihatan kelam kabut dan berpeluh pada masa itu. Tindakan OKT membawa SP8 ke pintu hadapan tempat duduk penumpang *juga* jelas menunjukkan pengetahuan OKT terhadap dadah tersebut kerana ia konsisten dengan keterangan bahawa dadah tersebut kemudiannya dijumpai di bawah tempat duduk di bahagian pintu tersebut.

(Emphasis added.)

[13] In the above passage, the part emphasised represents the evidence ruled inadmissible by the trial judge and in respect of which the Court of Appeal ruled that the trial judge had misdirected himself. There are two things to be noted in this ruling:

(i) Firstly, the impugned part is qualified by the word 'juga'. In other words, the learned trial judge considered the latter evidence as 'also' showing knowledge. Thus the impugned part did not form the foundation for the finding of 'knowledge', which was dealt with in the earlier portion in the above passage.

(ii) Secondly, it is clear that the learned trial judge had addressed his mind to all that had transpired before and at the time of arrest of the respondent to justify his finding of knowledge (see p 211(5) of the appeal record jilid 2):

> Pengetahuan (knowledge) OKT terhadap dadah tersebut telah dibuktikan melalui 'surrounding circumstances' berasaskan tindakan dan tingkahlaku OKT sebelum dan ketika OKT ditahan dan ditangkap.

[14] The respondent's case was that he was already under arrest when he made the incriminating statements. So, the issue for determination was the point of time he was arrested. The High Court did not make a specific finding on this aspect although PW8's evidence at p 90 of the appeal record jilid 2 shows that he had ordered D/Kpl Dumeran to handcuff the respondent upon the discovery of the cannabis in the car. According to the Court of Appeal, the respondent was under arrest the moment PW8 switched off the engine and took possession of the keys. This is what the Court of Appeal said:

> ... It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys.

[15] As to when is a person to be regarded as being under arrest for the purpose of s 37A of the Act is a question of fact to be decided according to the circumstances of each case (see *Public Prosecutor v Kang Ho Soh* [1992] 1 MLJ 360; [1991] 3 CLJ 2914). As to what constitutes an arrest, Suffian LP in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306 at p 311 adopted the statement of the law on the subject by Lord Devlin in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 at p 220 where he said:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries.

On the facts of *Jayaraman*'s case, Suffian LP said that it cannot be said that the applicants had been arrested by the corporal when he told them to wait and not to leave the temple, for he had merely stopped them to make enquiries into the attack on the temple.

[16] In *Public Prosecutor v Salleh bin Said* [1983] 2 MLJ 164, Syed Agil Barakbah J (as he then was) said that the words 'after his arrest' in s 37A(1) of the Ordinance meant, after actual arrest and not constructive arrest. In that case the evidence adduced by the prosecution was that on the day in question at about 7am on information received, Superintendent of Customs Zanzabir (PW3) accompanied by Senior Customs Officer Tee Thean Huat (PW4) and other customs officers raided the accused's house. PW3 and PW4 proceeded to the kitchen portion of the house where they met the accused's wife (DW5) who on being questioned stated that the accused was in the toilet outside the

house. The rest of the party surrounded the house. There was a Mercedes car parked under the house. When the accused came out from the toilet, PW3 obtained from him the keys to the car and in the presence of the accused, his wife, children and PW4 he unlocked the front door of the car and commenced to make a search. On pulling the lever under the dashboard of the bonnet, PW3 recovered two sacks which contained blocks of morphine. Each sack containing the drugs was found to be placed on either side of the engine compartment under the bonnet. On being questioned by PW3 as to the contents of the two sacks, the accused replied 'Morphine sembilan ketul, semuanya'. PW3 noticed that the accused look frightened. The accused then pointed to a spot about 15 feet away from the car where another sack was lying among other goods on the ground floor. When PW3 asked as to the contents of the sack, the accused replied 'Chandu sebelas ketul'. PW3 examined the sack in the presence of the accused and PW4 and found 11 slabs of raw opium. The accused was then arrested.

An objection was raised by the defence counsel as regards the admissibility of the accused's admission having regard to the words 'after his arrest' appearing in s 37A(1) of the Ordinance. In overruling the objection, the learned judge held that the words 'after the arrest' appearing in the section meant after actual arrest and not constructive arrest, thereby it was unnecessary for PW3 to administer the statutory caution as required under the same sub-section to the accused. The accused's admissions were ruled admissible.

[17] With regard to the present case, we have to look at the police report (P24) lodged by PW8 to find whether the oral statement made by the respondent to PW8 is admissible. P24 at p 243 of the appeal record jilid 2 reads:

> Bertindak atas maklumat pada 0300 hrs 28/1/2000 saya bersama anggota Narkotik terdiri daripada D/SJN 66641, D/KPL 89619, 89195, D/L/KPL 89467 dan 92728 telah buat ambush Station Minyak SHELL Jalan Batu Tiga Lama Klang. Pada masa yang sama telah datang sebuah kereta Proton Saga warna silver No. Pendaftaran BDH 8872 dan berhenti di Station Minyak Shell tersebut. Saya bersama anggota serbu ke kereta tersebut saya dapati pintu cermin sebelah pemandu terbuka dan saya kenalkan diri Polis lalu matikan enjin kereta dan ambil kunci kereta tersebut. Dapati dalam kereta itu ada seorang lelaki cina sedang duduk ditempat pemandu dan terus minta tolong bebaskan dia dan minta selesaikan masalah dan terus saya tanya apa masalah dan dia tunjukkan satu bungkusan kertas di bawah tempat duduk depan penumpang dan beritahu ada 'SAYUR' dalamnya. Saya terus bacakan kata-kata amaran di bawah seksyen 37A(1)(b) Akta Dadah Berbahaya 1952. Saya terus periksa bungkusan kertas yang ditunjukkan dan ambil pisau terus potong keratan kertas itu dapati ada balutan plastik berisi daun-daun kering disyaki daun ganja. Lelaki itu terus *minta tolong* dan saya terangkan kesalahan kepada lelaki itu. Pemeriksaan lanjut tiada jumpa apa-apa barang salah lagi dan terus saya bawa lelaki itu ke Balai Polis buat report. Butir-butir lelaki itu adalah:

1/ LIM HOCK BOON, KP.650717-10-5059,

T/Lahir: 17.7.65 @ 35 Thn

Kerja: Pemandu lori

Alamat: No. 28 Jln. Beringin 6, Taman Banting,

42700 Banting.

Di Balai Polis timbang barang kes berat kasar 950 gram ganja.

Sekian, Aduan saya.

(Emphasis added.)

[18] Unfortunately, the Court of Appeal did not consider P24. Quite clearly, P24 disclosed what actually took place during the ambush. As stated in P24, PW8 laid the ambush as a result of an information received. However at that time, there was no evidence to show that PW8 had knowledge that the respondent had committed a crime. As such, I, with respect, do not agree that the respondent was under arrest the moment his car was blocked by the police's car as contended by learned counsel for the respondent or the moment PW8 switched off the engine and took possession of the keys as ruled by the Court of Appeal. On the facts, it cannot be said that the respondent had been arrested by PW8 when he blocked the respondent's car and switched off the engine and took possession of the keys, for he had stopped him to make inquiries. At most the acts of blocking the car and switching off the engine and taking possession of the keys amounted to a constructive arrest. The need to administer the caution under s 37A of the Act only arises after actual arrest and not constructive arrest. Therefore, the respondent's statement seeking PW8's assistance to release him before PW8 could question him was admissible in evidence as the respondent then was not yet under actual arrest.

[19] Even assuming that the respondent was already under arrest when he made the statement it is still admissible under the proviso to s 37A(1)(b) of the Act which reads as follows:

(b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect —

> It is my duty to warn you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence: *Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.* (Emphasis added.)

[20] It must be observed that everything happened very fast. Immediately after the respondent made the statement the caution was administered. Thus the proviso to s 37A(1)(b) has been satisfied thereby making the statement admissible. In any event even after the administration of the caution the respondent continued pleading for help ... minta tolong ...' That being so, there was no error in the finding of fact of actual possession of the drugs by the respondent made by the learned trial judge. The learned trial judge was entitled to infer that the respondent had the required knowledge from all the circumstances of the case.

[21] In support reference may be made to the judgment of this court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 where the facts were somewhat similar. In that case, the respondent was charged with an offence of trafficking in 4,826.9g of cannabis under s 39B(1)(a) of the Act. A package was found under the driver's seat and another two packages were found under the front passenger's seat in the car driven by the accused. The packages contained cannabis. The respondent was convicted and sentenced to death by the trial court. On appeal, the Court of Appeal set aside the conviction under s 39B(2) of the Act and substituted it with an offence under s 6 punishable under s 39A(2) of the Act. It was held that there was sufficient evidence to establish beyond reasonable doubt that the respondent had custody and control of the three packages. In reliance on s 37(d) of the Act it was further held that there was presumed possession of the drug. The accused was sentenced to 18 years imprisonment and ordered to be given 10 strokes of the rottan. The prosecution appealed to this court against the decision of the Court of Appeal. The prosecution contended that independent of the presumption in s 37(d) of the Act there was ample evidence for the court to draw an inference that the accused knew what was contained in the three packages. In allowing the appeal, Arifin Zakaria FCJ (now CJ (Malaya)) in delivering the judgment of this court, said:

> [14] We agree with the submission of the prosecution that the proper approach to be adopted by the appellate court in the circumstances is that, having held that the cautioned statement was wrongly admitted, then it is for the court to scrutinise in totality the other evidence before it to see whether, quite apart from the cautioned statement, there is sufficient evidence to support the finding of the trial court. Regrettably the Court of Appeal failed to adopt such a course before coming to its conclusion. Hence, it falls upon this court to conduct such an exercise. The incontrovertible facts as found by the trial court was that the three packages were found in the car driven by the respondent. He was the only person in the car at the material time. One package was found under the driver's seat and two packages under passenger's seat. PW8 gave evidence that the car was in the

possession of the respondent for more than seven months prior to his arrest. In the circumstances we think the trial judge was right to hold that at the material time the three packages were in the custody and control of the respondent. Indeed the Court of Appeal agreed with the trial judge. But mere custody and control is not sufficient to establish possession for the purpose of the Act, there has to be established knowledge of such drug by the respondent. In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed:

> Possession itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed) p 304:
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

A [15]And further down on the same page, he added:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

B

[16] It is trite that what constitutes 'possession' under s 37 of the Act is a question of law (see *Vee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something. And in relation to drug found in a vehicle Shankar J in *Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360, after considering a number of authorities, at p 371 stated:

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> ... those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Chan Peng Hong v Public Prosecutor* at p 233:
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> E
>
> > If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it...
>
> Again, at p 234:
>
> F
>
> > I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle.

G

[17] Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639:

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I

> 21. For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant

time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1978–1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):

> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (Emphasis added.)

[18] In *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, the Singapore Court of Appeal again propounded on the question of knowledge necessary to establish possession and at p 541 states:

> Knowledge of drugs
>
> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis know that the bag found on his motorcycle contained drugs
>
> In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978–1979] SLR 211 at pp 217–218; [1980] 1 MLJ 49 at p 52):
>
> > Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

[19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In *Warner* the following question was posed to Their Lordships:

> Whether for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.

[20] The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

[21] In the same case Lord Morris answered the question in following manner:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[22] Reverting to the present case, it is therefore incumbent upon the court to scrutinise the entire evidence before the court to see whether an inference can be drawn against the respondent that he knew about the drug in the three packages found in the car. It is not in dispute that the three packages were found hidden in the car under the driver's seat and under the front passenger's seat. He was alone in the car at the material time. One other important factor of relevance is that the car had been in his possession for the past seven months prior to his arrest.

[23] It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the three packages found in the car and relying on the presumption under s 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.

[24] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that prima facie the respondent had possession of the drug independent of the statutory presumption under s 37(d) of the Act.

[22] So too here. The following pieces of evidence had been established and were before the court.

(i) The respondent was driving his car slowly in and out of an empty petrol station three or four times at 3 in the morning;

(ii) The car belonged to the respondent and he was alone at the material time;

(iii) The police had stationed themselves in the petrol station one hour before the respondent turned up. They saw no one alight from the car;

(iv) When the police identified themselves, the respondent was seen to be in a state of panic and was sweating;

(v) The respondent pleaded to PW8 for help, asking to be released, and

(vi) Cannabis weighing 892.4g was found hidden under the front passenger's seat of the respondent's car.

Thus, the clear inference from the combined evidence of (i), (ii) and (iii) above would be that the respondent had custody or control over the cannabis. With the evidence of (i), (iv), (v) and (vi) above the further inference was that the respondent had mens rea possession of the cannabis found in the car. Therefore, the learned judge did not err on the first issue.

THE SECOND ISSUE

[23] With regard to the second issue, I agree with the learned Deputy Public Prosecutor that the trial judge did not err in his handling of the facts. The focus of the Court of Appeal's judgment was with respect to the finding of the learned trial judge on the existence of Lim Hock Kee. The Court of Appeal held that the learned trial judge had rejected the existence of Lim Hock Kee when in fact the prosecution had accepted his existence. However, the evidence led by the respondent clearly attempted to place the blame on one Ah Ba. The respondent told the court that this so-called Ah Ba had borrowed the keys of the respondent's car to take something out of it. Hence, even if the learned trial judge had accepted Lim Hock Kee as a real person, it would have made no difference to his finding, in view of the blame cast on Ah Ba. In short, the name of Lim Hock Kee did not come up in any culpable manner.

[24] In *Teh Hock Leong v Public Prosecutor* [2008] 4 CLJ 764 the facts were that the appellant therein was arrested on arrival at KLIA from Thailand carrying a backpack which contained three wet towels and three pieces of underpants. The exhibits were seized. They were sent to the chemist for analysis and were found to contain 580.3g of methamphetamine. The appellant claimed that his Thai wife in Chiang Mai, whom he had visited prior to arriving in Malaysia had told him that a friend of his by the name of Ah Keong had telephoned her and asked Lim to bring back the clothes. The High Court found Ah Keong and the Thai wife to be fictitious characters. In the Court of Appeal (Gopal Sri Ram, Ahmad Maarop and Sulaiman Daud JJCA) it was argued that there was prosecution evidence to show that the Thai wife was not fictitious and as such the trial judge had failed to appreciate the evidence. In rejecting this, Gopal Sri Ram JCA, who wrote the judgment of the Court of Appeal, said at p 770 paras 9 and 10:

> In the course of his arguments learned counsel for the appellant made a complaint about the findings of the learned judge that the existence of the appellant's wife was a fiction. Learned counsel drew our attention to the several documents discovered from the backpack (exh P5) which, he said plainly proved that the wife was not a

fictitious person. It was emphasised that these documents were all produced by the prosecution as its exhibits and no attempt was ever made to discredit them in the course of its case. The point here made is that once the judge wrongly found the wife to be fictitious, his finding that Ah Keong was also fictitious becomes suspect. We have given very careful consideration to this important submission. However we have come to the conclusion that there is no merit in it. We will say why this is so.

It was absolutely essential for the prosecution to introduce the documents in question as part of the unfolding of its case. However in the course of considering the defence explanation it became fairly clear that the story put forward was wholly incredible for the reasons given by the learned judge which we find unnecessary to repeat here. Once the explanation failed on its own inanition, the existence or non existence of the wife bore no relevance to the existence or otherwise of Ah Keong. The learned judge having held that Ah Keong did not exist, the defence of innocent carrier raised by the appellant fell to the ground.

[25] Applying the foregoing findings to the facts of the present case, since the respondent sought to blame only Ah Ba but not his brother Lim Hock Kee, the fact that the trial judge in the present case had found Lim Hock Kee to be fictitious had no relevance.

[26] On the question of whether Ah Ba was a real person, the issue was decided purely on the facts, based on the credibility of the witnesses and the inherent probabilities of their testimonies. This is what the learned trial judge said at p 213 of the appeal record jilid 2:

Berhubung dengan isu kewujudan seorang rakan OKT bernama Ah Ba yang didakwa ada bersama-samanya semasa malam kejadian sebelum OKT ditahan, saya mendapat fakta ini adalah rekaan OKT semata-mata. Keterangan OKT atas isu ini adalah tidak konsisten dan saya menerima keterangan pihak serbuan polis yang tidak dicabar yang menyatakan mereka hanya melihat OKT seorang sahaja di tempat kejadian di Stesyen Minyak Shell berkenaan.

[27] Indeed, the above passage clearly shows that the learned trial judge was alive to the facts and made a finding of fact based on competing versions of events by the witnesses. He could not accept the existence of Ah Ba because in the end he preferred the version given by the prosecution that the respondent was alone at all material times and no one alighted from the respondent's car. The learned trial judge was entirely correct in the view he had expressed about the quality of the defence evidence. Therefore, there was no failure by the learned trial judge to judicially appreciate the evidence before him. He handled the facts well.

ALTERNATIVE GROUND

[28] There is another matter that needs to be considered by this court. The

A Court of Appeal had ruled that the alternative ground advanced by the learned trial judge that the respondent was guilty of trafficking because his case came within one or more of the acts set out under the definition of the word 'trafficking' in s 2 of the Act is against both authority and principle. This is what it said at p 123 para 15:

B

> It is clear that *Chow Kok Keong v Public Prosecutor* [1998] 2 CLJ 469 tolled the death knell of *Teh Geok Hock v Public Prosecutor* [1989] 1 CLJ (Rep) 160. With it came to an end to the misconception that the definition of trafficking in s 2 of the Act could be proved in aid at any stage of a case to impose criminal liability on an accused. With respect, the learned judge in the instant case also appears to
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> C have overlooked the effect of *Chow Kok Keong*. This is a serious misdirection.

[29] On a closer examination of the two cases, I agree with the learned deputy public prosecutor that the above passage does not represent a correct
D reading of the cases. In *Teh Geok Hock*, the accused was caught with 36.97g of heroin in 10 small plastic packets stuffed down his underpants. He contended that he was a severe drug addict and the heroin found was for his own consumption. He was convicted of trafficking in the said drug. The Supreme Court, in rejecting his appeal, held at p 162 as follows:

E

> True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity albeit often with sinister implication. See also the *Shorter Oxford English Dictionary*.
>
> F The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64. Considering this case
>
> G from the evidence of both the prosecution and the defence the facts proved to fall squarely into the definition of 'trafficking' in our Act. The appellant was found in possession, custody and control of the said heroin the weight of which is more than 15grammes. This invoked the presumption of trafficking under s 37 of the Act. There is the undisputed evidence of concealment (10 packets of the heroin found
>
> H concealed in the underpants of the appellant). The appellant also admitted that he bought the drugs for his friends and that he would distribute the drugs to the friends. Finally in his cautioned statement he stated that he wanted to sell the drugs to one Saw Chai working in Paris Pub.

On perusal, there is nothing in *Teh Geok Hock* to suggest that the prosecution
I could not rely on s 2 to establish trafficking. The case also did not hold that passive possession or self-administration could never be a defence. On the contrary, the finding of trafficking was affirmed on the facts of the case and not on the basis that self-consumption or passive possession could never be invoked as a defence.

[30] In *Chow Kok Keong*, the appellant was arrested while having in his custody and control a bag containing 86.6g of heroin and was charged with trafficking in the said drug pursuant to s 39B(1)(a) of the Act. In the court below, the appellant had put up a defence that he did not know the contents of the bag, and that the bag was given to him by one Ah Seng who told him that it contained food. The learned trial judge rejected the defence and, having examined the definition of trafficking in s 2 of the Act and the case of *Teh Geok Hock*, convicted the appellant. The appellant appealed. In allowing the appeal the Federal Court substituted the conviction with one for possession of the drug, an offence punishable under s 39A(2) of the Act, and amongst other things, it ruled:

> (5) The learned judge, in relying on the definition of trafficking in s 2 and the decision in *Teh Geok Hock v Public Prosecutor* when rejecting the appellant's defence, had overlooked the more recent decisions in *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 1 CLJ (Rep) 18 and *Ng Chai Kem v Public Prosecutor* [1994] 2 CLJ 593 that, in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act.

[31] It is clear from the above ruling that the defence of self-consumption is available in a prosecution for trafficking in dangerous drugs. But whether it will succeed or not would very much depend on the facts of each case. The then Supreme Court in *Cohen Lorraine*, said at p 21:

> It is implicit in the judgment in *Teh Geok Hock* that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case.

[32] Thus, the reliance placed by the Court of Appeal on *Chow Kok Keong*, to hold that the definition section under s 2 of the Act could never be invoked to impose criminal liability, was, with respect, misplaced.

[33] A good example where the definition of trafficking in s 2 of the Act was invoked is in the case of *Public Prosecutor v Abdul Manaf Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129. There the Federal Court, in order to avoid contravening the bar against the use of double presumptions following the case of *Muhammed Hassan v Public Prosecutor* [1998] 2 CLJ 170, substituted the presumption of trafficking under s 37(da) of the Act relied on by the trial court, to find trafficking in the dangerous drugs by carrying under s 2 of the Act. The Federal Court ruled that the Court of Appeal ought to have applied the proviso to s 60(1) of the Courts of Judicature Act 1964 and upheld the conviction and sentence notwithstanding

A the misdirection by the learned trial judge in applying the double presumptions under 37(d) and (da) of the Act to convict the accused.

[34] It is worthy of note that there is only one offence of trafficking under the Act. However, there are several acts that may constitute the offence. If the B prosecution is not able to bring its case within one of the acts (see *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64) under s 2 of the Act, but is nevertheless able to establish the existence of primary facts that draw the presumptions under the Act, then the court is enjoined to draw those C presumptions, subject of course to the bar as set out by *Muhammed Hassan*.

[35] In the instant case, there was an express finding of actual possession by the learned trial judge and since the weight of the cannabis exceeded the trigger amount of 200g or more of the drug, he applied the presumption of D trafficking under s 37(da) of the Act against the respondent. The failure of the respondent to even cast a reasonable doubt over the prosecution case, when in fact he had a heavier burden ie on the balance of probabilities to rebut the presumption of trafficking, meant that the respondent was rightly convicted E by the High Court. With this kind of evidence before the court, the Court of Appeal ought to have found that the conviction was safe.

[36] Hence, the appeal is allowed. The orders of the Court of Appeal are set aside whilst the orders of conviction and sentence of the High Court are F restored.

[37] My learned brothers Alauddin Mohd Sheriff PCA and Augustine Paul FCJ have read this judgment and have expressed their agreement with it.

G

Abdul Aziz Mohamad FCJ:

H **[38]** The facts are more or less set out in the judgment of my learned brother, Nik Hashim FCJ.

[39] In order to establish trafficking by relying on the presumption of trafficking in s 37(da) of the Act that arises from possession of the requisite I amount — an amount of or above the prescribed minimum — of cannabis, the prosecution had to prove that the respondent was in possession of the cannabis in this case. But to prove the element of knowledge that is necessary to establish possession, the prosecution could not also rely on the presumption of knowledge in s 37(d). That is because of the ruling in

Muhammed Hassan v Public Prosecutor [1998] 2 MLJ 273; [1998] 2 CLJ 170. So the prosecution had to rely on evidence from which actual knowledge could be inferred.

[40] At pp 11 and 12 of his grounds of judgment the learned trial judge stated his findings at the close of the case for the prosecution as to the element of knowledge and the other element that is necessary for possession, which is sometimes called 'custody' or 'control' and which the learned trial judge called 'actual possession'. As to the latter, he said that this element was proved by the facts that the cannabis, which was wrapped in plastic and paper, was in the car belonging to the respondent and that he was alone in the car.

[41] As to knowledge, the learned trial judge said that this was proved by the 'surrounding circumstances'. The circumstances that he mentioned were, first, the fact that the respondent begged to be let off (dilepaskan), secondly, the respondent's appearing to be in a panic and to be sweating, and, thirdly, the respondent's leading Chief Inspector William Kuyal (PW8) to the front-passenger door of the car. At p 27 of the grounds of judgment the learned trial judge said that after hearing the evidence of the respondent he adhered to his findings at the close of the case for the prosecution, and at p 28 he summarised those findings in five points. In point (5) he said that the respondent's knowledge was proven by 'surrounding circumstances' of his conduct before and at the time he was restrained (ditahan) and arrested, but did not specify the conduct. The learned DPP argued that item (5) meant that the surrounding circumstances that the judge took into account were more than the three matters that he had specifically mentioned earlier, and included the manner in which the cannabis was hidden in the car, the amount of it, and the fact that the respondent was cruising about the petrol station, which was closed, several times at 3 in the night before stopping at the air-pump. This argument may be inferred from paras 29.2 and 41 of the DPP's written submission dated 29 July 2008. Although unfortunately he did not specify it, by conduct before the respondent was restrained the learned trial judge must have meant the act of cruising about the closed petrol station several times at that hour and stopping at the air-pump.

[42] With proof of actual possession, that is proof without relying on the presumption in s 37(a), and with resort to the presumption of trafficking in s 37(da), the learned trial judge said that at the close of the case for the prosecution he found that the prosecution had made out a prima facie case of trafficking.

[43] The Court of Appeal held, as one of two grounds for finding the conviction of the respondent unsafe and allowing his appeal, that the learned trial judge had misdirected himself in relying on 'incriminating statements'

made by the respondent after his arrest and before being cautioned. Proviso (3) to s 37A(1) of the Act renders a statement made in such circumstances inadmissible. The Court of Appeal held that the moment the Chief Inspector turned off the engine of the car and took possession of the keys the respondent was under arrest and those statements were made after the arrest. The Court of Appeal also said that the learned DPP conceded that the respondent was under arrest when he made the statements. It is not absolutely clear from what the Court of Appeal said whether it was in the trial court or in the Court of Appeal that the DPP so conceded. But during the trial objection had been taken to the evidence of the respondent pointing towards the place where the cannabis was found and the learned trial judge had ordered that the evidence be expunged. And before us the learned DPP said that in the High Court the prosecution conceded that the information given to the Chief Inspector was inadmissible. That must have been because the prosecution accepted that, as the Court of Appeal found, the respondent had been arrested when he made the statement or gave the information. That is why in this appeal the learned DPP did not attempt to argue that the police action of blocking the respondent's car, switching off the engine and seizing the key did not amount to an arrest.

[44] The learned DPP in fact, in para 30 of his said written submission, impliedly accepted that 'the impugned part' of the circumstances that the learned trial judge relied on to infer knowledge was inadmissible. He, however, argued in that paragraph that the learned trial judge was entitled to infer knowledge from all the remaining circumstances and in para 41 he submitted that the only reasonable inference from those circumstances is that the respondent knew about the cannabis in the car.

[45] Now the Court of Appeal did not specify what were the 'incriminating statements' by relying on which the learned trial judge had misdirected himself. Was it just the third circumstance, that is, the respondent's leading the Chief Inspector to the front-passenger door? Or was it also the respondent's plea to be let off? The learned DPP understood it to be the third circumstance — as the respondent's counsel also seemed to understand — and it was this that the learned DPP referred to as the 'impugned part' and that he impliedly conceded was not admissible.

[46] As regards the plea to be let off, the respondent's counsel in this appeal admitted that the respondent's counsel in the High Court unfortunately did not raise objection to it but it was raised in the Court of Appeal. And he submitted in this appeal that it was inadmissible, even as conduct, for the same reason that the third circumstance was inadmissible.

[47] The learned DPP took the stand that the plea to be let off was made

before the car engine was switched off, which again indicates that the learned DPP accepted that there was an arrest at that point in time. It is clear from my reading of the evidence of the Chief Inspector that the plea was made after the engine was switched off. The learned trial judge, too, in setting out at the beginning of his grounds of judgment the facts adduced by the witnesses for the prosecution, placed the plea after the switching off of the car engine. It is true, as the learned DPP pointed out, that later in the grounds of judgment the judge said that the plea was made as soon as (sebaik sahaja) the Chief Inspector identified himself, but that was the place where he was setting out the 'surrounding circumstances' implying knowledge. I believe that there he was merely concerned with the fact of the plea and he was not particular about the point in time because he was not considering the question whether the plea was made before or after arrest.

[48] The learned DPP further submitted that the plea was not a statement but was conduct asking for help. The exact words of the Chief Inspector as to what the respondent did were 'meminta bantuan tolong untuk melepaskannya'. In my judgment that was a statement and the conduct was in the statement. Without the statement there would have been no conduct. In my judgment the statement was inadmissible.

[49] But although the learned trial judge misdirected himself, as the Court of Appeal found, in accepting and relying on the evidence of the respondent's leading the Chief Inspector to the front-passenger door, and, as the Court of Appeal might have found and as I find, in accepting and relying on the plea to be let off, in my judgment there was enough prima facie proof of knowledge in the remaining evidence, particularly the evidence of cruising about the closed petrol station several times and stopping at the air-pump at 3 o'clock in the night, which, as I said, the learned trial judge must have taken into consideration. Clearly the respondent was looking for someone. It could not have been mere coincidence that a man who was looking for someone in the vicinity of a closed petrol station at 3 o'clock in the night had a considerable amount of cannabis hidden under the front-passenger seat of a car which belonged to him and which he was driving with no one else in it. It must have been in connection with the cannabis that he was looking for that someone at such an hour and such a place. The irresistible inference is that he knew about the cannabis in his car.

[50] In my judgment, therefore, despite the misdirection, the learned judge's finding of knowledge and of prima facie proof of trafficking by the presumption in s 37(da) was a safe finding.

[51] But that was not all. The learned trial judge said that, alternatively, he found that the prosecution had established a prima facie case of actual

'trafficking', as defined in s 2 of the Act, where it is defined as including the doing of any of several acts, including the 'keeping' or 'concealing' of any dangerous drug. For proof of the act of keeping or concealing, the learned trial judge relied on the evidence that the cannabis was found under the front-passenger seat of a car belonging to the respondent and driven by him. For actual trafficking, the amount of the drug is not material, and therefore the prosecution did not have to rely on the presumption in s 37(da) from possession of the requisite amount of drug. As for knowledge, which is also necessary for actual trafficking, the prosecution could then rely on the presumption in s 37(d) of knowledge from custody or control of the thing in which the drug is contained.

[52] In the Court of Appeal, the learned DPP argued in support of the learned trial judge's alternative finding of actual trafficking. The Court of Appeal rejected the argument. Since I find that the finding by the learned trial judge of a prima facie case of trafficking by presumption was a safe finding, I do not need to find whether his alternative finding was correct and I do not intend to adjudge that finding. But I feel constrained to nevertheless deal with this aspect of the case because I find that the Court of Appeal's reasons for rejecting the learned DPP's argument were not sound. The Court of Appeal rejected the learned DPP's argument because 'both principle and authority' were against it. As for principle, the Court of Appeal said, 'It is settled law that a definition section in an Act of Parliament does not create an offence'. Of course it does not, but the definition of 'trafficking' in s 2 of the Act defines what the offence of trafficking in s 39B is and renders any of the acts in the definition an act of trafficking for the purposes of that section.

[53] As for authorities, the Court of Appeal relied on two authorities. The first is a passage from that part of the judgment of the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 67, a Singapore case, where Their Lordships were dealing with the question of construction of the Misuse of Drugs Act 1973 of Singapore. I shall refer to Singapore's 1973 Act in the past tense because I have not verified the present state of Singapore's statute on the subject, it being unnecessary to do so for the purposes of this judgment. Before I quote the passage relied upon by the Court of Appeal, it is necessary to observe that the structure of Singapore's Act was different from ours in several respects. For instance, whereas the presumption in our s 37(da) from possession of a dangerous drug of or above the prescribed minimum is that of trafficking, the presumption in the Singapore Act's s 15 was that of 'possession for the purpose of trafficking' in the drug. The construction of Singapore's Act that the Privy Council were concerned with was as to how that presumption worked in a situation where 'an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another' (p 69G (right)) and that question had reference to the

fact that the verb 'transport' was one of the verbs included in the meaning of 'traffic'. The passage that the Court of Appeal relied on was part of the chain of reasoning that resulted in the answer to the question, so that to understand the real import of that part one needs to understand the whole chain of reasoning, and to do that one has to carefully read the whole of the judgment and appreciate the structure of the Singapore Act as it bore on the reasoning. The passage is not a self-contained or self-sufficient passage from which it is appropriate to pluck a lesson to be directly applied to the judicial implementation of our act. The passage is as follows:

> This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in Their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

[54] To know what the 'very wide description of acts' mentioned at the beginning of the passage refers to, it will be necessary to read the previous part of the judgment. My understanding from reading the previous part is that it refers to the description in the sections mentioned in the passage itself, ss 10 and 3(c), particularly s 10, which provided as follows:

> 10 Any person who abets the commission of or who attempts to commit or does any act preparatory to or in furtherance of the commission of any offence under this Act shall be guilty of such offence and shall be liable on conviction to the punishment provided for such offence.

[55] In my judgment, the passage relied upon by the Court of Appeal is no authority for rejecting the DPP's reliance on the alternative ground on which the learned trial judge in the present case found that the prosecution had made out a prima facie case of trafficking.

[56] In rejecting the learned DPP's argument in favour of the alternative finding of actual trafficking, the Court of Appeal treated it as amounting to, or arising from, a 'misconception that the definition of trafficking ... could be prayed in aid at any stage of a case to impose criminal liability on an accused'. The Court of Appeal's second authority for rejecting the argument was *Chow*

Kok Keong v Public Prosecutor [1998] 2 MLJ 337 (FC), which the Court of Appeal said had 'tolled the death knell' of *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 and put an end to the misconception.

Teh Geok Hock was a decision on appeal to the then Supreme Court and was about an attempt to rebut the presumption of trafficking in heroin in s 37(da)(i) of the Act by virtue of which the appellant had been called upon to make his defence. The heroin had been found in small plastic packets concealed under the front part of the appellant's underpants. His defence was that he was a drug addict and that the heroin was for his own consumption. The learned trial judge accepted that the appellant was a drug addict but rejected the appellant's explanation that the heroin found in his possession was for his personal consumption. The Supreme Court's understanding of the judge's decision was 'that having viewed the totality of the evidence he was satisfied that the presumption of trafficking was not rebutted on the balance of probability' (p 163F (right)). The Supreme Court dismissed the appeal, obviously agreeing with the trial judge.

[57] At p 163H (left), the Supreme Court said that the judge 'was satisfied that the appellant was trafficking in the drugs as charged and convicted the appellant'. Of course, having found that the appellant had failed to rebut the presumption of trafficking, the judge had no choice but to be satisfied that the appellant was guilty of trafficking in the drugs as charged and, I may add, as proved by the prosecution with the aid of the presumption. But — and this is the part of the Supreme Court judgment that puzzles me – the Supreme Court would appear to have thought that the learned judge, in rejecting the defence of personal consumption, found that the appellant was guilty of actual 'trafficking' as defined in s 2, and the Supreme Court would appear to have thought that it was necessary for the learned judge to have so found, because the Supreme Court went on to quote the definition of 'trafficking' and to then say:

> True, the definition in the act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication. See also the *Shorter Oxford English Dictionary*. The definition of 'trafficking' in the act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.
>
> Considering this case from the evidence of both the prosecution and the defence the facts proved fall squarely into the definition of 'trafficking' in our Act. The appellant was found in possession, custody and control of the said heroin the weight of which is more than 15g. This invoked the presumption of trafficking

under s 37 of the act. There is the undisputed evidence of concealment (ten packets of the heroin found concealed in the underpants of the appellant). The appellant also admitted that he bought the drugs for his friends and that he would distribute the drugs to the friends. Finally in his cautioned statement he stated that he wanted to sell the drugs to one Saw Chai working in Paris Pub.

[58] Be that as it may, *Teh Geok Hock* was about the defence of personal consumption of the drug that an accused was in possession of and the decision of the Supreme Court implies that the defence is available and will succeed if accepted as probable. It was not about the availability of a choice to the prosecution of proving, on the same facts, trafficking either by the presumption in s 37(da) or by proving any of the acts encompassed by the definition of 'trafficking' in s 2.

[59] Before coming to *Chow Kok Keong*, I will say something about *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289, a decision of the then Supreme Court on appeals from the High Court, because that case was relied on in *Chow Kok Keong*. Apparently the prosecution relied on evidence of actual 'trafficking' as defined. What the Supreme Court decided in that case was that in a prosecution for trafficking in a dangerous drug the defence of personal consumption was available. Among other things the Supreme Court, at p 29B–C (right), said, 'It is implicit in the judgment in *Teh Geok Hock* that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case'.

[60] I come now to *Chow Kok Keong*, a decision of this Court on Appeal from the High Court, delivered by Edgar Joseph Jr FCJ. The appellant had been caught carrying, while riding a motorcycle, a plastic bag containing two packets wrapped in plastic and newspaper, which were proved to contain 86.6g of heroin. The learned trial judge found that the prosecution had succeeded in establishing a prima facie case of trafficking in reliance on the presumption of trafficking in s 37(da)(i). The appellant's defence was that one Ah Seng had requested him to carry the plastic bag, saying that it contained food. The learned trial judge, for various reasons related to the defence evidence, found the appellant's explanation unacceptable. In this respect, this court found that the learned trial judge 'had erred in his handling of the facts, when considering the case for the defence' (p 349C).

[61] Edgar Joseph Jr FCJ said at p 345B that in rejecting the evidence adduced by the defence and finding that it had failed to rebut the statutory presumption, the learned trial judge also drew attention to the definition of 'trafficking' in s 2, and continued as follows:

The judge then noted that the effect of the above section, according to the Supreme Court case of *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 (per Hashim Sani CJ at p 163), was this:

> The definition of trafficking is wide and includes not only buying and selling, but also carrying, concealing and keeping.

The judge next found that it was clear that the appellant was carrying the bag which contained the heroin. Because the weight of the heroin was more than 15g, the presumption of trafficking under s 37(da) arose.

It is not clear from the judgment of this court in what way the learned trial judge, who rejected the defence on the facts and the evidence, also relied on the definition of 'trafficking' and on *Teh Geok Hock* to find that the defence had failed to rebut the statutory presumption.

[62] In this court, according to Edgar Joseph Jr FCJ, the appellant's counsel conceded that at the close of the case for the prosecution it had been proved by affirmative evidence that the appellant was found in possession of the drugs and that the judge had correctly invoked the presumption of trafficking in s 37(da), but although he maintained that the presumption had been rebutted he conceded that the appellant was in passive possession of the drugs and urged that the appellant's conviction be substituted with one for possession in contravention of s 6.

[63] This court's response to that was in the following passage, which the Court of Appeal relied on in the present case, beginning at p 347H:

> To revert to the grounds of judgment, in considering and rejecting the defence of the appellant, the judge had, as we have said, relied on the definition of trafficking in s 2 of the act set out earlier herein.
>
> And, as we have also noted, the judge had relied on the Supreme Court case of *Teh Geok Hock v PP* [1989] 3 MLJ 162, where the court briefly considered the effect of the definition of trafficking aforesaid and, in particular the court observed:
>
> > The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.
>
> The judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 3 MLJ 289, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of

drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v Public Prosecutor* [1994] 2 MLJ 210, the Supreme Court followed *Cohen*.

In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic.

[64] That passage is about the defence of passive possession or self-consumption. As I understand the passage, this court understood the learned trial judge to be relying on *Teh Geok Hock* as an authority laying down that passive possession or self-consumption can never be a defence to a charge of trafficking, and this court itself understood *Teh Geok Hock* to be so implying. But as I have shown, *Teh Geok Hock* implies the contrary. Even *Cohen* itself recognised *Teh Geok Hock* as implicitly saying that the defence of own personal consumption is available. Therefore there was nothing to choose between *Teh Geok Hock* and *Cohen*. They went in the same direction. The statement in *Chow Kok Keong* that *Cohen* had 'severely watered down.' *Teh Geok Hock* was unwarranted and if that was the death knell of *Teh Geok Hock* that the Court of Appeal in the present case meant, it was not — it was just a false alarm.

[65] But what really is of importance for the present case is that *Chow Kok Keong* is by no means an authority that denies to the prosecution the choice of proof of actual trafficking as an alternative to reliance on the presumption of trafficking in s 37(da).

[66] The Court of Appeal also said that allowing the prosecution that choice in the present case would 'run foul of the requirements of fundamental procedural fairness' because, according to the Court of Appeal:

Throughout its case, the prosecution proceeded on the basis that it was relying on s 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s 37(da) of the act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.

For this aspect of their judgment, the Court of Appeal relied on a passage in the High Court judgment in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, as laying down the principle 'that once the prosecution elects to rely on one of the statutory presumptions in s 37 of the act, it cannot at a later

stage of the trial seek to rely on the very general definition of s 2 of the Act'. It was a judgment of Augustine Paul J now FCJ and a member of the present panel of this court.

[67] It must, first of all, be appreciated that the learned trial judge in this case said that he found an alternative case of actual trafficking at the close of the case for the prosecution, and not, as the Court of Appeal said, 'at the end of the case'.

[68] The judgment in *Chia Leong Foo* does not state whether the prosecution proceeded on the basis of actual trafficking only or on the basis of trafficking by presumption only, but apparently it was a case in which the prosecution sought to rely on whichever means that was available to prove trafficking, because at p 727C–D the learned judge found that, on the evidence, the prosecution had made out a prima facie case of trafficking by transporting the 218.79g of heroin in the charge, and added, 'I did not consider it appropriate to rely on the relevant presumptions provided by the Act in view of the evidence available to make out the charge against the accused'. This means that had it been considered appropriate, the learned judge would have applied the presumptions. This further means that the learned judge recognised that the prosecution was conducted on the basis that trafficking was to be proved either as an actual act of trafficking or by the presumption in s 37(da) and that it was quite in order for the prosecution to have been so conducted.

[69] The passage from *Chia Leong Foo* that the Court of Appeal relied on was the end part of a lengthy discussion of the applicability of the presumptions in the act and the part in which the learned judge concluded, at p 725E–G, as follows:

> ... I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the available evidence is not safe or satisfactory to be relied upon. The mandatory nature of the presumption provisions must therefore be read in that light to mean that where there is evidence only of the basic facts the presumed facts must be deemed to exist unless the contrary is proved ...

[70] As I construe the judgment, the only purpose of the discussion and that conclusion was to pave the way for, and to justify, the basis of the learned judge's finding at p 727C–D, that I have set out, that the prosecution had made out a prima facie case of trafficking. I do not construe that conclusion as directed to the basis on which a prosecution is conducted and as saying that the prosecution ought not to proceed on a presumption if there exists evidence of the fact to be presumed. That would be an impracticable

direction that would place the prosecution in a very difficult and awkward position. As I said, the learned judge recognised that the open basis on which the prosecution proceeded in that case was in order. Judging from his finding at p 727C–D, it seems to me that the conclusion that I have quoted was one intended for a judge to consider in making his finding at the close of the case for the prosecution. The passage from *Chia Leong Foo* that the Court of Appeal relied on in the present case does not, to my understanding, lay down the principle, to quote the Court of Appeal again, 'that once the prosecution elects to rely on one of the statutory presumptions in s 37 of the act, it cannot at a later stage of the trial seek to rely on the very general definition of s 2 of the Act'.

[71] The Court of Appeal's other ground for finding the conviction of the respondent unsafe was that the learned trial judge had erred in his handling of the facts relating to the defence.

[72] The defence of the respondent was that the cannabis had been placed in the car by someone without the respondent's knowledge. Since he had no knowledge of the existence of the cannabis, he was not guilty of its trafficking. By the evidence that the respondent gave in support of the defence, he sought to persuade the court that one of several persons could have placed the cannabis in the car. One was his brother Lim Hock Kee, who he said had borrowed his car in the morning of 27 January 2000. Another was Ah Heng, a workmate of the respondent's, who the respondent said had also been using the car. Another was one Ah Ba with whom the respondent claimed he spent the evening and night of 27 and 28 January 2000 at a karaoke lounge and later at an eating place for supper and whom he drove to the petrol station to enable him to find a toilet to use at the petrol station. The respondent claimed that it was while he was waiting at the air-pump for Ah Ba to return, after cruising about the petrol station several times to prevent engine-overheating, that the police confronted him.

[73] The respondent said that while he and Ah Ba were at the karaoke lounge, Ah Ba had gone to the respondent's car after asking the respondent for the car key, saying that he wanted to get something from the car, but the respondent said that he was not certain whether Ah Ba wanted to get something from the car or to put something in it. Ah Ba did not return the key when he rejoined the respondent and it was only while they were walking to the car to leave the place that the respondent realised he did not have the key and got it back from Ah Ba.

[74] The learned trial judge rejected the defence, finding that the respondent had failed to cast a reasonable doubt on the case for the prosecution. As to the story about Ah Ba, the learned trial judge found it to

A be a mere fabrication because he accepted the evidence of the police witnesses, who had kept surveillance about the petrol station for about one hour before the respondent first appeared there in the car, that the respondent was alone.

B

[75] The part of the defence that involved Ah Ba was the only eventful part, a part with a story. Assuming, as the learned trial judge found, that the story was a fabrication, the only reason for fabricating the story, with the incidence of Ah Ba going to the car whether to take something from it or to
C place something in it, was to persuade the court that Ah Ba was the most likely person to have placed the cannabis in the car, besides to account for the presence and conduct of the respondent at the petrol station that night. If it had been for the latter purpose only, there would have been no necessity to fabricate the story about Ah Ba asking for the car key. Assuming that Lim
D Hock Kee and Ah Heng did use the respondent's car, the need to fabricate the story about Ah Ba means that the respondent himself was not confident that the court would accept it as probable that Lim Hock Kee or Ah Heng had placed the cannabis in the car. The defence that sought to implicate Ah Ba was therefore the essential defence.

E

[76] As regards Ah Heng, the learned trial judge in fact rejected the involvement of Ah Heng for the principal reason that if Ah Heng had used the car he would have removed from the car his belongings before returning it to the respondent.

F

[77] As regards Lim Hock Kee, the respondent's wife, who was a prosecution witness (PW7), had stated in her evidence that Lim Hock Kee had been borrowing the car to convey his children to school and that the last
G time he had borrowed the car was on the morning of 28 January. The learned trial judge, when considering the case for the prosecution, had found that the story about Lim Hock Kee borrowing the car on the morning of 28 January was a fabrication because on the morning of 28 January the car had already been seized by the police. That reason for rejecting the evidence I find is bad
H because obviously the wife had confused the date. She must have meant the morning of 27 January. The learned trial judge also found that Lim Hock Kee was a fabricated character. But he went further and said that even if Lim Hock Kee existed and did use the car, for reasons that he gave but I need not set out, Lim Hock Kee could not have placed the cannabis in the car.

I

[78] After hearing the evidence of the respondent, the learned trial judge dealt with the question of Lim Hock Kee again. Among other things he said that the respondent's failure to call Lim Hock Kee to give evidence deprived the respondent's testimony about Lim Hock Kee of weight.

[79] It was in relation to Lim Hock Kee that the Court of Appeal found that the learned trial judge had erred in his handling of the facts. The Court of Appeal so found because the appeal record confirmed that the prosecution accepted the existence of Lim Hock Kee and because it was not reasonable to expect the respondent to produce him since even the police had been unable to locate him.

[80] I agree with the Court of Appeal that in that respect the learned trial judge erred in his handling of the facts. But even if he had not erred in that respect, even if he accepted the existence of Lim Hock Kee and had not taken into consideration the respondent's failure to produce him, he would still, going by what he had said when he was considering the evidence of the respondent's wife, have rejected, and rightly in my judgment, the suggestion that it was Lim Hock Kee who had placed the cannabis in the car. Furthermore, as I have said, the essential defence of the respondent was not in respect of Lim Hock Kee but was in respect of Ah Ba, and that was rightly rejected.

[81] To conclude, the finding of the Court of Appeal that the conviction of the respondent was unsafe was lacking in justification. I accordingly would allow the appeal, set aside the orders of the Court of Appeal and restore the conviction and sentence of the High Court.

Appeal allowed. Orders of the Court of Appeal set aside. Conviction and sentence of the High Court restored.

Reported by K Nesan